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No. 1043

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

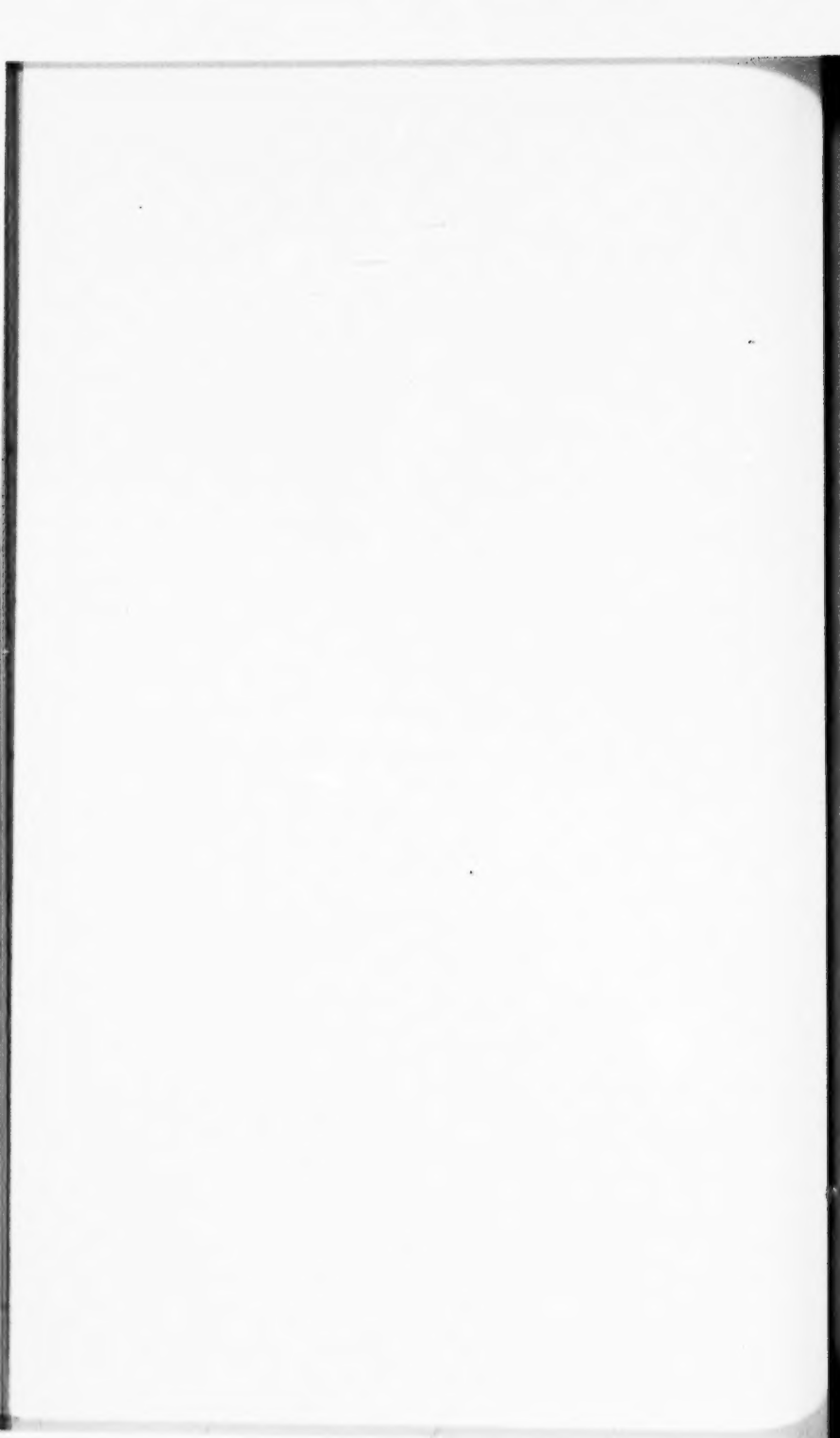
JAMES H. O'HARA, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR  
CERTIORARI

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ARGUMENT

Point I

The Court of Appeals below did not depart from the record in deciding that a motion for summary judgment in favor of the District of Columbia was granted by the District Court below.

Petitioner contends in this court for the first time that the District of Columbia made no motion in the trial court for a

summary judgment and that, therefore, the trial court should not have entered such a judgment in favor of the District. The District did file a motion entitled "Motion for Summary Judgment in Favor of Plaintiff" in which it moved the court "to order entry of judgment in favor of the plaintiff on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to a judgment as a matter of law" (R. p. 10). While it is true that this motion, except in its title, did not refer to a summary judgment, it did move for judgment on the grounds set forth in paragraph (c) of Rule 56 of the Rules of Civil Procedure as the grounds for the granting of a summary judgment. It is obvious petitioner was in no way mislead since he, in response to such motion, filed a paper entitled "Answer to Motion for Summary Judgment (Res Adjudicata)". (R. p. 10.) In his typewritten brief in the Court of Appeals (page 4), petitioner states that "appellee filed a second motion for summary judgment"; that "appellant filed in writing an answer to the motion for summary judgment" and that the court "filed his order granting the motion". It is obvious that until the filing of this petition, appellant regarded the motion made by the District of Columbia as a motion for summary judgment upon which the order granting the summary judgment was properly based.

## Point II

**The overruling of the District of Columbia's first motion for summary judgment did not preclude the granting of the second motion.**

The action of the District Court in overruling the first motion for summary judgment was not res judicata of the second motion. This action was originally brought in The Municipal Court for the District of Columbia under the forcible entry and detainer statute. Sec. 20, D. C. Code, 1901, approved March 3, 1901, 31 Stat. 1193, as amended April 19, 1920, 41

Stat. 555, Sec. 11-735 D. C. Code, 1940. Under this statute, it was the duty of the District to allege and prove that appellant was forcibly detaining the property. This allegation of the complaint was denied in the plea of title (R. p. 2). No affidavits upon this subject were filed and hence there was an issue as to a material fact. While counsel for petitioner in his petition for writ of certiorari filed in this court (page 3) states that, in denying the first motion for summary judgment, the trial court "adjudged that there was a genuine issue as to a material fact, in that the possibility of a reverter of title to the petitioner, through abandonment, forfeiture, misuser and nonuser of such land, was a matter of fact to be determined upon the merits before a jury", there is nothing in the record to support this statement. On the contrary, it is obvious the court denied the motion because of the issue of fact as to whether the detainer was forcible. Petitioner, in his answer to the second motion for summary judgment (R. p. 11), states that contemporaneously with the denial of the first motion "Mr. Justice Pine suggested that the present amended complaint be filed without dismissing the original action, if agreeable to the parties" and that "defendant consented to this". Certainly the trial court would not have suggested the complaint be amended to lie in ejectment if the same objection to a summary judgment would exist. It is obvious the suggestion was made to avoid the issue of forcible detainer and present solely the question of title. The difference between an action for forcible entry and detainer and an action in ejectment is stated by the United States Court of Appeals for the District of Columbia in *Brown v. Slater*, 23 App. D. C. 51, where it is said:

"\* \* \* The proceedings for forcible entry and detainer are not the equivalent of the action of ejectment. Whatever the latter may have been in its origin, its purpose in our country and in our American jurisprudence has always been primarily to determine the question of title, and only secondarily, and



as a corollary to the other, the question of the right of possession. The proceedings for forcible entry and detainer and for unlawful detainer were devised by the legislative authority as a remedy to supplement the insufficiency of the action of ejectment in cases in which there is no lawful right or claim of title, and possession is perversely withheld from the lawful owner. The title is not tried and is not at issue in them, but solely the right to the possession. The proceeding for forcible entry and detainer and for unlawful detainer was devised mainly to meet the case of vexatious and dishonest holding over by tenants of property leased or rented to them. \* \* \*

The proceeding originally instituted in The Municipal Court, and certified to the District Court upon the filing of the plea of title pursuant to the provisions of Sec. 23, D. C. Code, 1901, 31 Stat. 1193, as amended February 17, 1909, 35 Stat. 623, Sec. 11-738, D. C. Code, 1940, was an entirely different action from that embodied in the complaint in ejectment filed under different sections of the Code<sup>1</sup> and which could only have been filed in the District Court. Entirely different questions were presented.

A similar situation arose in the District of Columbia in the case of *Fraser v. Doing*, 76 U. S. App. D. C. 111, 130 F. (2) 617. A motion for summary judgment was granted in the District Court by Mr. Justice Morris after an earlier motion for summary judgment had been overruled. The appellate court said:

“Appellant’s third objection is that Justice Bailey overruled appellee’s original motion for a summary judgment; consequently, that his decision became res judicata of the renewal motion and established the law of that phase of the case. Consideration of this

<sup>1</sup> Sec. 984, D. C. Code, 1901, 31 Stat. 1347, as amended June 30, 1902, 32 Stat. 537, Sec. 16-501, D. C. Code, 1940; Sec. 985, D. C. Code, 1901, 31 Stat. 1347, Sec. 16-503, D. C. Code, 1940; Sec. 988, D. C. Code, 1901, 31 Stat. 1347, Sec. 16-505, D. C. Code, 1940.

objection requires the following additional statement of case chronology: Following the filing of appellant's complaint in Civil Action No. 607, appellee, on June 23, 1939, moved for a summary judgment for the reason that there was 'no genuine issue as to any material fact \* \* \*' and that she was entitled to a judgment as a matter of law. On February 6, 1940, Justice Bailey heard the motion and ordered that it be overruled 'without prejudice to the defendant's further rights in the case.' On the same day appellee filed a renewal motion for summary judgment upon entirely different grounds; challenging in this motion, for the first time, the use of a bill of review or complaint in the nature of a bill of review.

"The foregoing statement is sufficient to reveal that this third objection is, also, without merit. The original motion, for the reason heretofore explained, was wrongly conceived, upon the theory that the language of Rule 56 (c), concerning a 'genuine issue as to any material fact \* \* \*' was applicable to appellant's complaint. This motion was overruled without prejudice. It seems likely that Justice Bailey, at that time, explained to counsel the applicable law concerning bills of review which challenge alleged errors of law apparent upon the face of the record, and that he also explained the inapplicability of Rule 56(c). This seems apparent because the renewal motion, based upon proper grounds, was filed immediately afterwards. It is obvious, in any event, that Justice Bailey's ruling upon the question presented in the original motion did not pass upon, and was not intended to pass upon, the question presented in the renewal motion. Consequently, it did not become the law of the case upon that point, and the principle of *res judicata* has no application."

Certainly, had the District elected to dismiss its forcible entry and detainer proceeding and file a new action in ejectment in the District Court, there can be no doubt but that the question of *res judicata* could not have been raised. The filing of the amended complaint in ejectment, with the con-

sent of the petitioner, was equivalent to the bringing of a new action.

### CONCLUSION

For the reasons hereinbefore stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

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